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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1016

FEDERAL POWER COMMISSION, *Petitioner*

v.

LOUISIANA POWER & LIGHT COMPANY, *Respondent*

(The "Collateral Proceeding")

FEDERAL POWER COMMISSION, *Petitioner*

v.

LOUISIANA POWER & LIGHT COMPANY, et al, *Respondent*

(The Curtailment Proceeding)

Brief of Respondent New Orleans Public Service Inc. in opposition to Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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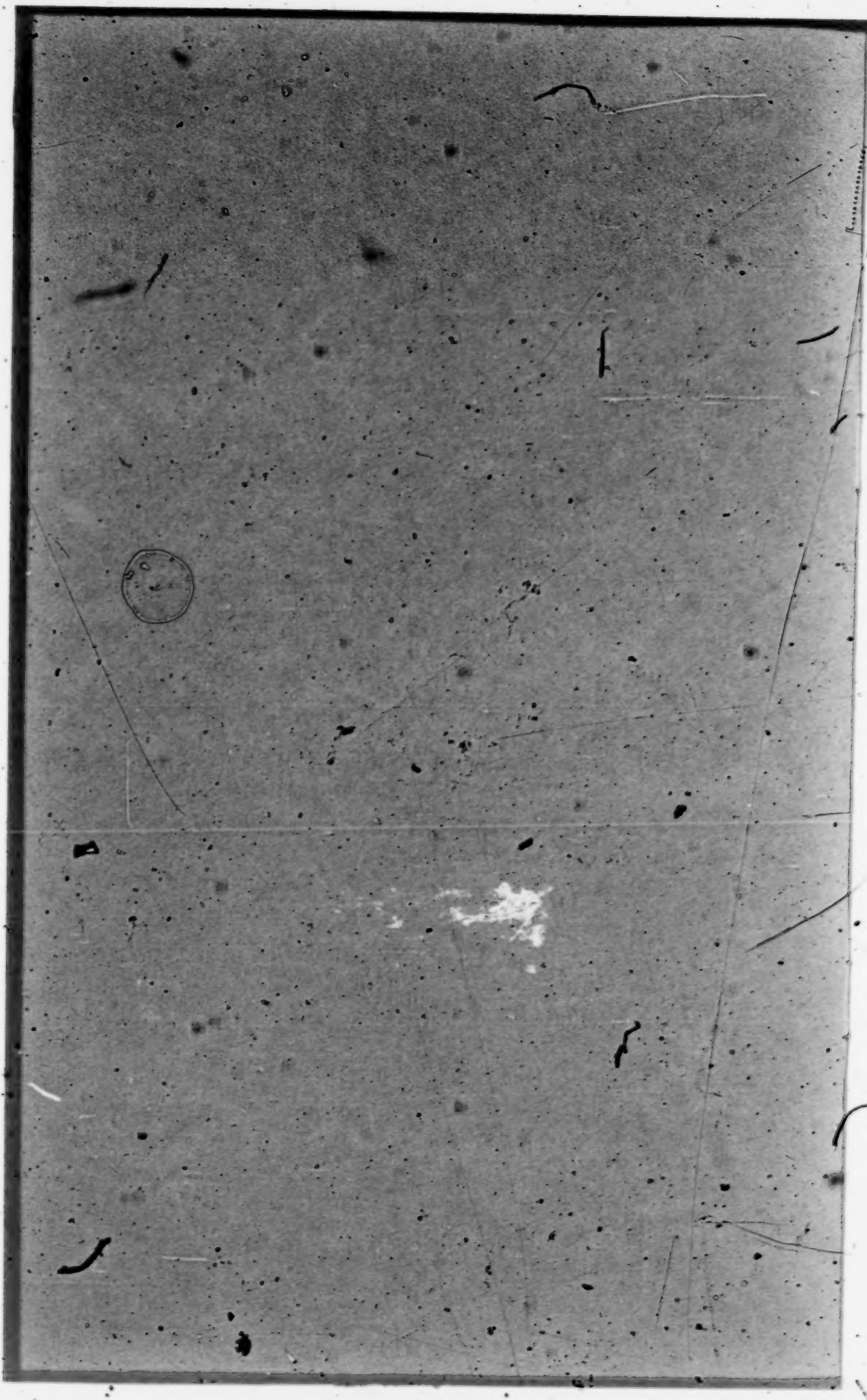

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Respondent New Orleans Public Service Inc. (NOPSI) was not a party to the "Collateral Proceeding". NOPSI was a party to the curtailment proceeding before the Commission and is a party to the "Curtailment Proceeding" pending in the Court of Appeals. The Commission

seeks removal of this cause from the Court of Appeals and decision by the Supreme Court without any prior judicial decision or action.

Jurisdiction

As to the "Curtailment Proceeding", jurisdiction is not conferred by 28 U.S.C. 1254(1) because the petition invokes the original jurisdiction of this Court, which is controlled by Article III, Section 2, of the Constitution.

Questions Presented

I. In the Curtailment Proceeding:

Whether this Court should remove a pending cause from the Court of Appeals and make the original judicial review of an order of the Federal Power Commission.

II. In the Injunction Suit:

Whether this Court should grant certiorari to review an interlocutory order of the Court of Appeals.

Reasons for Denying the Writs

I. In the Curtailment Proceeding:

The petition asks this Court to grant certiorari before judgment in a case which went directly from the Commission to the Court of Appeals. The first question which arises is whether this Court would be exercising original jurisdiction if it should become the first judicial tribunal to decide this case. If this is an exercise of original jurisdiction, the case clearly is outside the original jurisdiction of this Court under Article III, Section 2 of the Constitution.

Petitioner cites no case (and we can find none) where this Court granted certiorari before judgment in a case which went directly from an administrative agency to a court of appeals. This Court has declined consistently to be the first judicial tribunal to decide a case where original jurisdiction is not conferred by Article III, Section 2 of the Constitution. *United States v. Rice*, 327 U.S. 742, 747-748; *Wheeler Lumber Bridge and Supply Company v. United States*, 281 U.S. 572, 576. Compare *Old Colony Trust Company v. Commissioner*, 279 U.S. 716, 728-729. See Stern and Gressman, *Supreme Court Practice*, pp. 28-30 (4th ed., 1969); Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States*, Section 132.

Even if this Court decides that the petition invokes appellate jurisdiction, respondent submits that certiorari should be denied under Rule 20 of the Supreme Court Rules. That rule states that certiorari before judgment will be granted "only upon a showing that the case is of such imperative public importance as to justify a deviation from normal appellate processes and to require immediate settlement in this Court".

Assuming, *arguendo*, that certiorari should be granted in the injunction case, the requirement of Rule 20 must still be satisfied with respect to the curtailment proceeding. Certiorari before judgment is sought in the curtailment proceeding solely in order to get the record in that proceeding before this Court in the injunction case. (Petition for Certiorari, pp. 12-13, 20-21.) Respondent submits that the "showing" contained in the petition falls far short of the requirement of Rule 20.

The petition suggests that the opinion of the Court of Appeals in the injunction case has created an emergency

which would justify certiorari before judgment in the curtailment proceeding. (Petition for Certiorari, pp. 14-16, 22-23.) In fact no such emergency exists. Pursuant to Commission order, United filed a curtailment program affecting all of its customers and on July 2, 1971, the Commission ordered United to carry out its filed curtailment plan pending a decision on the issues. (App. 73a, Petition for Certiorari.) This order has not been stayed nor has United been enjoined from curtailing deliveries of gas to direct customers; such deliveries are in fact being curtailed currently under plans filed by United and approved by the Commission.

NOPSI buys all of its gas supply from United, NOPSI resells gas in the City of New Orleans and also uses gas as fuel for generating electricity which it distributes in New Orleans. The NOPSI-United Contract is in the curtailment proceeding record (R-7236-7293). It provides, in the event of shortage, that United shall first supply *all* the requirements of domestic consumers of gas (which would include hospitals, schools, etc.); that United shall next supply *all* the requirements of electric power plants using gas to generate electricity for domestic consumers, and that the remaining available gas, if any, shall be prorated among other customers.[1]

1. "Buyer specifically recognizes the fact that Seller delivers gas to (a) gas utilities other than Buyer for resale to domestic and industrial consumers, (b) steam electric power plants for use in generating electricity which is sold to domestic consumers, and (c) industrial consumers. In the event a shortage of gas renders Seller unable to supply the full gas requirements of all of its customers, including Buyer, then it is mutually agreed that the gas requirement of gas utilities (including Buyer) selling gas to domestic consumers (but only to the extent of gas required for resale to such domestic consumers) shall first be supplied by Seller. If Seller is unable to supply gas for all the requirements of such gas utilities for resale to

The record of the Commission hearings shows that all of United's direct sales contracts contain the above or similar language. Thus the direct sales contracts set up a system of priorities which renders impossible the hypothetical situation described on pp. 14-15 of the petition.

II. In the "Collateral Proceeding":

Here the petition seeks review of the judgment of the Court of Appeals. That judgment is not a final judgment; it remands the cause to the District Court for disposition on its merits. (App. B, pp. 28a-29a, Petition for Certiorari.)

In the absence of a very exceptional and compelling reason, this Court has refused consistently to grant certiorari to review a judgment remanding a case to the district court for trial. In *American Construction Company v. Jacksonville, Tampa and Key West Railway Company*, 148 U.S. 372, 384, this Court said: "'Clearly, therefore, this Court should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from

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domestic consumers, then gas for such requirements shall be supplied ratably. In the event Seller is able to supply gas for all the requirements of such gas utilities for resale to domestic consumers, then there shall next be supplied the gas requirements of steam electric power plants (including plants of Buyer) using gas for the generation of electricity which is sold to domestic consumers, whether such power plants purchase their requirements from Seller or from gas utilities (including Buyer) purchasing their requirements from Seller, and, if Seller does not have sufficient gas to supply all of the requirements of said power plant (including plants of Buyer), then said requirements shall be supplied ratably. After the above gas requirements have been supplied, the remaining gas supply, if any, shall be prorated by Seller among its other customers, including Buyer, and other gas utilities to the extent of gas sold by them to their customers."

an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." See also *Brotherhood of Locomotive Firemen and Enginemen v. Bangor and Aroostook Railroad Company*, 389 U.S. 327, 328, and *Hamilton Shoe Company v. Wolf Brothers*, 240 U.S. 251, 257-258.

Respondent submits that it is not necessary that writ of certiorari be issued to "prevent extraordinary inconvenience and embarrassment in the conduct of the cause". The cause is back in the District Court for trial on its merits. There are no injunctions or other legal restraints on further litigation of this cause by the parties, nor are there any restraints on further administrative proceedings by petitioner. As a matter of fact, the administrative process is proceeding just as it did before the opinion of the Court of Appeals issued on January 14, 1972. For example, on October 5, 1971, the Commission remanded the curtailment proceeding to the Examiner for further hearings. (App. E, p. 75a, Petition for Certiorari) On February 17, 1972, pursuant to the remand, the Examiner scheduled for June 1, 1972, a hearing on the environmental impact of United's curtailment program. (App. P, infra, pp. P-1—P-6)

The real source of all of Petitioner's complaints concerning action by the Court of Appeals is the *opinion* of that Court—not its *judgment*. Petitioner argues that the Court of Appeals erred in ruling that the Commission has no jurisdiction over the facilities known as the "Green System". (Petition for Certiorari, pp. 19-20) Petitioner's point seems to be that the Court of Appeals should have waited for the Commission to make the initial determination of this question. But the Court of Appeals did not

interfere with the administrative process in the certificate proceeding. On the contrary, the Commisison conducted a lengthy hearing which was concluded on June 18, 1971. And on February 9, 1972, the Commission issued its Opinion No. 610 in the certificate proceeding, holding, contrary to the Court of Appeals, that it has jurisdiction over the facilities in question.[2] In this opinion and order the Commission remanded the certificate proceeding to the Presiding Examiner and set the next hearing for April 25, 1972. No doubt there will be appeals from this order, but the Administrative process goes on unimpeded. Meanwhile direct customers served by the "Green System" continue to be curtailed under the curtailment program filed by United and approved by the Commission.

Conclusion

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted,

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2. See App. F, p. 91a, Petition for Certiorari in United Gas Pipe Line Company v. Louisiana Power & Light Company, No. 71-1040.

APPENDIX P

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

United Gas Pipeline Company) Docket Nos. RP71-29,
RP71-120, RP71-99

PRESIDING EXAMINER'S ORDER REOPENING HEARING AND DIRECTING COMPLIANCE WITH THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

(February 17, 1972)

In Opinion No. 606 issued October 5, 1971, remanding the above entitled proceeding, the Commission directed the Presiding Examiner, *inter alia*, to ". . . also include findings concerning the environmental impact of the United curtailments." While perhaps implicit therein, by virtue of Sections 2.80-2.82 of the Commission's Rules of Practice & Procedure, such direction was not contained in the initial hearing order of December 10, 1970.

At the post hearing conference thereafter convened on October 20, 1971, the Presiding Examiner directed that those parties wishing to do so file proposed findings bearing on the environmental impact of United's curtailment program supported by specific references to the record. Few of the parties chose to file such proposed findings. Such as were filed clearly demonstrated the insufficiency of the record insofar as any environmental considerations were concerned. Nevertheless, in order to avoid reopening of the record and the resultant delay, it was the Presiding Examiner's intention to write his opinion, determining

those issues for the purpose of which this proceeding was remanded, and to make such limited environmental findings as could be made on the basis of the existing record.

However, the Court's conclusion in the recent case of *Greene County Planning Board v. Federal Power Commission*, ____ F.2d 1395, (C.A. 2, Jan. 17, 1972) that "the Commission was in violation of NEPA by conducting hearings prior to the preparation by its staff of its own impact statement" (Slip Op. p. 1411), makes it clear that failure to reopen the record for that purpose and issuance of an initial opinion by the Presiding Examiner prior to preparation of a detailed environmental impact statement by the Commission staff, "subject to the full scrutiny of the hearing process", (Slip Op. p. 1412) would constitute reversible error.

Another recent case, City of New York, et al. v. The U.S.A., I.C.C. et al. ____ F. Supp. ____ (E.D. N.Y. decided Jan. 20, 1972) (three-judge court, Friendly, J.), decided almost simultaneously with the Green County case, affirms the conclusion that the instant case similarly must be reopened for compliance with NEPA. The case involves a railroad abandonment proceeding and the possible pollution of the atmosphere by reason of the replacement of trucks for the railroad. Despite the fact that the environmental issue "was first raised by the City in its Exceptions to the Examiner's report," the Court nevertheless disregarded the fact that the hearing had been concluded and remanded the case to the I.C.C. for further proceedings stating; "The tardiness of the parties in raising the issue cannot excuse compliance with NEPA; primary reponsibility under the Act rests with the agency." (Slip Opinion pg. 17) The Court's discussion of the issue

was concluded with, "Thus, this proceeding must be remanded to the Commission for it to bring itself into compliance with the law."

It is to be noted that the Court in the *Greene County* case determined that the part of the project under discussion therein, namely construction of a transmission line 35 miles long, constituted a "major federal action." (Slip Op. p. 1408) In the instant case the adverse environmental impact of United's curtailment of natural gas deliveries, and the substitution of alternate fuels for the portion curtailed, particularly power plant and industrial customers, will be manifest all along the 10,656 miles of United's pipeline system extending across the states of Texas, Louisiana, Mississippi, Alabama and Florida. Applying the logic of the former to the latter, the Presiding Examiner will have no difficulty finding that United's curtailment program, and the Commission's determination with respect to the validity thereof, constitutes a "major federal action." The direction in Opinion No. 606 to the Presiding Examiner to make environmental impact findings strongly indicates that the Commission has already reached the same conclusion. It is further to be noted that while the Court in Green County construes NEPA in relation to a hydroelectric project, Section 102(c)(2) of NEPA, and the Court, speak in terms of *all "proposals* for . . . major federal actions significantly affecting the quality of the human environment."

United filed its petition in this case on October 26, 1970. The Commission's order setting the matter for hearing was issued December 10, 1970. Commission Order No. 415 promulgating Sections 2.80 through 2.82 of the Commission's Rules of Practice and Procedure entitled

"Statement of General Policy to Implement Procedures For Compliance with the National Environmental Policy Act of 1969" was issued on December 4, 1970, and amended by Commission Orders No. 415-A issued April 13, 1971, and 415-B issued November 19, 1971. It is a matter of record that none of the parties to this proceeding have complied with the procedures outlined in Section 2.82 of the Rules, perhaps by reason of the fact that the section on its face appears to be limited to certificate applications, and the fact that they were issued only a few days before issuance of the Commission's initial hearing order in this case. However, inasmuch as the stated purpose of these regulations is to implement NEPA, which Act concerns itself with *all* major federal actions, and which, for all intents and purposes, parallels the requirements of Section 102(c)(2) of NEPA and Section 10(b) of the Guidelines of the Council on Environmental Quality, it is conclusive that such regulations must also apply to *all* major federal actions. Moreover, NEPA Section 102(1) directs that "to the fullest extent possible" regulations should be interpreted and administered in accordance with the policies of NEPA.

In the present posture of this proceeding, it does not appear that reopening of the record will result in any substantial, or in fact any, delay of final Commission determination of this proceeding in the light of the action taken, and to be taken, in connection with *Louisiana Power and Light v. United Gas Pipe Line Co., et al.*, ____F.2d____, (C.A. 5, 1972). Should some delay nevertheless result, the parties are referred to the comments of the respective Courts on the subject in the *Greene County* case, *supra,* (Slip Op. p. 1412), and in *Calvert Cliffs*

Coordinating Committee, Inc. v. Atomic Energy Commission, 449 F.2d 1109, 1122.

The Court in *Greene County* admonished the "Commission to determine the most efficient procedure for meeting this mandate" (Slip Op. p. 1412). Accordingly, to achieve compliance with NEPA, the Commission's Rules of Practice and Procedure, and the requirements set out in *Greene County Planning Board v. F.P.C., supra,* it is ordered that:

1. On or before March 10, 1972, United file a detailed statement with copies to all parties, of the environmental impact of its curtailment program, developing fully the five factors listed in Section 102(2)(c) of NEPA.

2. Such statement shall then immediately be submitted by Staff for comment to the Federal agencies having "jurisdiction by law or special expertise with respect to any environmental impact involved" (NEPA, Sec. 102(2)(c).

3. Commission Staff shall serve copies of the comments of the Federal agencies referred to in paragraph 2 hereof on the parties to this proceeding immediately upon receipt thereof. Commission Staff shall also prepare its own detailed statement concerning the environmental impact of United's curtailment program on or before May 15, 1972, with copies to all parties and be prepared to produce a witness, or witnesses, to sponsor such statement and be cross-examined thereon on the date hereinafter fixed by the Presiding Examiner.

4. On or before May 15, 1972, all intervenors taking a position with respect to the environmental impact of United's curtailment program shall file with the Commission an analysis of their respective environmental positions such as that contemplated by Section 2.82(c) of the Commission's Rules of Practice and Procedure with copies to all parties and shall offer written prepared testimony in support thereof which shall be filed with the aforementioned analysis.

5. Reopening of the hearing, limited to admission of testimony relating to the environmental impact of United's curtailment program, as hereinabove described, and cross-examination thereon, is hereby scheduled for June 1, 1972. Said date shall be subject to change upon request of any of the parties for good cause shown.

MARTIN E. RENDELMAN
Martin E. Rendelman
Presiding Examiner